U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: AUGUST 6, 1999

Case No. 1999-INA-118

In the Matter of:

KBC ADVANCED TECHNOLOGIES, INC.,
Employer,

On behalf of:

ROBERT CHARLES TUFTS,
Alien.

Certifying Officer: Charlene G. Giles
Dallas, TX

Appearance: Scott F. Cooper, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination

[1]The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

(FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Senior Chemical Engineer with DOT Title Chemical Engineer, DOT # 008.061-018, a wage offer of $74,000 per year, job duties of:

> Provide consulting services to the refining industry, specializing in residue processing, and specifically delayed coking (including gas plant handing facilities); conduct thorough analysis of unit operating practices; make recommendations based on findings to alleviate current operating constraints to increase unit efficiency and facility profitability; ensure corporate policies and federal regulations are followed to ensure safety; and ensure mechanical reliability of equipment. Evaluate units by using simulation tools such as GYSIM, PROII, PETROfine, and COKOP. Recommend changes to current operating practices or control; and recommend improvements to units or their design. Additional responsibilities include being a source of technical expertise in delayed coking; and keeping the Coking/Visbreaking/Thermal Cracking process technology group inhouse residue processing technology current. (AF 248)

The minimum requirements for the job were listed as seven years of experience in the job offered or seven years' experience as a Senior Process Engineer or Senior Startup Engineer or Operations Technical Specialist or Operations Engineer. (AF 248) Other special requirements included:

> Applicants' experience and/or research must include developing, reviewing and modifying operating procedures for delayed cokers and reformer catalyst

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

> regeneration procedures; applying Kepner Tregoe analytical troubleshooting techniques; developing and recommending the implementation of gap control logic on the coker fracture unit to reduce coking cycle time; conducting critical risk/hazard study in crude/coking areas to determine reliability; and using simulations tools to monitor/optimize plant performance. (See Addendum, AF 250-251)

The application was denied by the CO on the basis that the employer's experience requirements were found to unduly restrictive. In the NOF, employer was required to submit evidence to show that the alien gained the required work experience prior to employment with the petitioning employer and to submit documentation to show that the job duties existed prior to the alien's employment with employer or show the business necessity for such requirements. (AF165) Employer's rebuttal evidence was determined to be insufficient and, therefore, the CO denied labor certification on the grounds that it appeared that the job duties had been "tailored" to meet the alien's background experience and qualifications. (AF 126)

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that it has submitted substantial documentation from professional experts in oil and gas exploration confirming that the minimum education and experience requirements and special requirements are not unusual or unduly restrictive for the particular industry. Also, employer maintains that it did not possess a pre-existing job description for the particular position, but that the submitted documentation demonstrates that the duties are normal and customary to the occupation.

DISCUSSION

The employer has failed to justify reversal of the FD, which stated, in denying the application:

> 656.21(b)(5) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.
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> > A Notice of Findings dated April 27, 1998, required the employer to submit evidence that the alien gained the required work experience prior to employment with the petitioner. The employer was also requested to submit documentation to show that either the exact job duties existed prior to the alien's employment with the petitioner or a major change in business operation caused the position to be created after the alien was hired.

> In rebuttal of May 22, 1998, the employer addresses the business necessity of the job duties stated on the ETA 750, Part A. The employer did not address, however, the issue of whether the alien gained the required work experience prior to employment with the petitioner. Furthermore, the employer did not submit any documentation to show that the exact job duties existed prior to the alien's employment with the petitioner, or that a major change in business operation caused the position to be created after the alien was hired.
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> Since the ETA 750, Part B shows that the alien gained the required work experience with the petitioner in the position for which certification is sought, and the employer was unable to prove that the job requirements existed prior to the alien's employment or that a major change in business operation had occurred, it appears that the job qualifications were tailored to meet the alien's background and qualifications. This results in unduly restrictive job requirements. Consequently, the application is denied. (AF 126)

The appeal attempts to overcome the FD by arguing, among other things, that it need not show business necessity for job duties, citing *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), and that affidavits of other employers demonstrate the requirements are normal for the occupation and therefore could not be unduly restrictive. Employer, on appeal just as it did on rebuttal, attempts to circumvent a showing of its own past actual minimum requirements by referring to stereotyped, indeed identical, affidavits claiming that the employer's requirements are normal for the industry. (AF 198, 203, 212, 224 and 229) Even if those cloned statements were considered credible on the issue of normal industry requirements, they do not establish the practice or requirements of the employer. The rebuttals attempted to excuse the lack of direct evidence through the claims that employer "does not maintain a personnel manual including the requirements for each position" and that changing conditions "preclude specifying this in a static personnel manual." (AF 132 and 199) The appeal claims that "employer did not possess a pre-existing job description for the particular position." (AF 7) The latter claim of non-possession of a "job description for the particular position" is somewhat of a leap from the quoted rebuttal statements asserting the non-existence of a "static personnel manual" specifying the "requirements of each position." This proceeding is not concerned with each position with the employer or a static personnel manual, but only a job description of the position at the time the alien was hired, which the employer has carefully obfuscated notwithstanding the direction of the April 27, 1998 that "documentation should consist of, but is not limited to, previous position descriptions or vacancy announcements which identify the experience requirements of the instant job." (AF 165)

Also, as noted in the FD, "[t]he employer did not address, however, the issue of whether the alien gained the required work experience prior to employment with the petitioner", and the

"ETA 750, Part B shows that the alien gained the required work experience with the petitioner in the position for which certification is sought." (AF 126)

The burden of proof in alien certification is on the employer. 20 CFR §656.2. *Universal Diesel Services*, 1994-INA-250 (Oct. 4, 1995). Twenty C.F.R. § 656.2(b) quotes § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, as follows:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act...

The legislative history of the 1965 amendments to the Act establishes that Congress intended that the burden of proof for obtaining labor certification be on the employer who seeks an alien's entry for permanent employment. *See* S. Rep. No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334. The burden of proof is upon the employer in these proceedings and the employer herein failed to meet the requirements of the regulations as directed by the CO.

Section 656.21(b)(5)[3] provides:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Under the first prong of § 656.21(b)(5), an employer must demonstrate that the requirements it specifies for the job are its actual minimum requirements and that it has not hired the alien or other workers with less training or experience for jobs similar to the one offered. An employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 1990-INA-184 (Dec. 19, 1991); *Gerson Industries*, 1990-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 1988-INA-104 (Dec. 22, 1988); *MMMats, Inc.*, 1987-INA-540 (Nov. 24, 1987). An employer must show that it has not previously hired personnel for the position who do not possess the requirements specified in the labor certification application. *Texas State Technical Institute*, 1989-INA-207 (Apr. 17, 1990). An employer may not hire an alien with fewer

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[3] **Note:** For labor certification applications filed on or after November 22, 1991, the effective date of the 1990 amendments to the Act, the regulations regarding actual minimum requirements have been recodified from 20 C.F.R. § 656.21(b)(6) to § 656.21(b)(5).

qualifications than it is now requiring if it has not documented that it is not now feasible to hire a U.S. worker without the training or experience. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). *Van Nuys Auto Sales*, 1994-INA-386 (Oct. 25, 1995). An employer cannot require U.S. workers applying for the job opportunity to have the same type of experience that the alien acquired only while working for the employer in a similar job. *AEP Industries*, 1988-INA-415 (Apr. 4, 1989) (en banc); similarly, a job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989) (*en banc*); *Bear Sterns & Co., Inc.*, 1988-INA-427 (July 29, 1989). Where the alien did not possess the minimum job requirements at the time of hire, certification was properly denied. *Hagopian & Sons, Inc.*, 1994-INA-178 (May 4, 1995).

Employer has not disputed the finding in the FD, that "The employer did not address, however, the issue of whether the alien gained the required work experience prior to employment with the petitioner." Nor has it disputed the finding that the "ETA 750, Part B shows that the alien gained the required work experience with the petitioner in the position for which certification is sought." Employer has skirted this clearly stated issue both in rebuttal and on appeal. We do not think we should bite the apple of the alien's own lack of prior qualifications which employer has twice ignored and implicitly admitted. Having thus failed to meet the first prong of section 656.21(b)(5), it is necessary to consider whether employer, under the second prong, has shown "that it is not feasible to hire workers with less training or experience than that required by the employer's job offer." The second prong of section 656.21(b)(5) operates as a savings clause: if the employer cannot demonstrate that the job requirements are the actual minimum ones or that it has not hired workers with less training and experience, then it can attempt to demonstrate that is not feasible to hire workers with less training or experience than that required by the job offer. The employer bears a heavy burden of proving infeasibility to train. An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rogue and Robelo Restaurant and Bar*, 1988-INA-148 (Mar. 1, 1989) (*en banc*). The employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy. *58th Street Restaurant Corp.*, 1990-INA-58 (Feb. 21, 1991); *Fingers, Faces, and Toes*, 1990-INA-56 (Feb. 8, 1991). An increase in the volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility. Unless an employer proves otherwise, increased training capability is presumed to accompany growth. See *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 1988-INA-415 (Apr. 4, 1989) (en banc); *Anderson-Mraz Design*, 1990-INA-142 (May 30, 1991); *Primex Plastics Corp.*, 1989-INA-283 (Apr. 8, 1991); *Ramazzotti Landscaping, Inc.*, 1990-INA-78 (Feb. 22, 1991); *58th Street Restaurant Corp.*, 1990-INA-58 (Feb. 21, 1991); *Able Labs*, 1990-INA-54 (Jan. 29, 1991); *J.J. Cassone Bakery, Inc.*, 1989-INA-74 (Feb. 20, 1990); *Laura's French Baking Co.*, 1989-INA-61 (Jan. 31, 1990); *Laura's French Baking Co.*, 1989-INA-53 (Oct. 30, 1989); *Pro-Torque, Ltd.*, 1988-INA-352 (June 27, 1989); *L and I Color Labs*, 1989-INA-217 (June 13, 1990); *G.C. Construction Corp.*, 1988-INA-20 (May 9, 1988). A bare statement of infeasibility to train is inadequate to establish that an employer cannot now hire workers with less experience and provide training. *MMMATS, Inc.*, 1987-INA-540 (Nov. 24,

1987) (*en banc*); *Coastal Printworks, Inc.*, 1990-INA-289 (Oct. 29, 1991); *Valor Roofing*, 1990-INA-182 (July 30, 1991); *Altra Filter, Inc*., 1990-INA-15 (Dec. 7, 1990); *BSN Industries, Inc*., 1988-INA-53 (May 6, 1988). Documentation must show more than just inefficiency. *Admiral Gallery Restaurant*, 1988-INA-65 (May 31, 1989) (*en banc*); *Coastal Printworks, Inc*., 1990-INA-289 (Oct. 29, 1991); *Carillon Mills, Inc.*, 1990-INA-17 (Dec. 19, 1990); *Global Committee of Parliamentarians on Population and Development*, 1988-INA-209 (Mar. 12, 1990); *Hoffman-LaRoche, Inc*., 1988-INA-30 (July 21, 1988). The burden is not on the CO to offer evidence documenting that the employer can offer the same training to U.S. workers. To the contrary, the burden rests with the employer to document why it is no longer feasible to provide training that was provided to the alien. *California-Nevada Annual Conference of the United Methodist Church*, 1988-INA-364 (June 28, 1989).

The questions of whether a job requirement represents the employer's actual minimum requirement and whether it is an unduly restrictive job requirement are similar. Section 656.21(b)(2), governs unduly restrictive job requirements, while actual minimum requirements are analyzed under section 656.21(b)(5). See, e.g., *Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*); *Duval-Bibb Co.*, 1988-INA-280 (Apr. 19, 1989). Most Board decisions have linked actual minimum requirements with prior hiring practices of the employer, although this is not always the approach. See, e.g., *Snowbird Development Co.*, 1987-INA-546 (Dec. 20, 1988) (*en banc*). Here the CO has cited both sections in the NOF and the FD. The appeal addresses only section 656.21(b)(2) and contends that it is inapplicable in view of the employer's "evidence that the special requirements are 'normal requirements for the occupation in the area of intended employment' consisting of affidavits of four disassociated professional experts in oil and gas exploration and production." (AF 4)

Even if the affidavits were found sufficient to establish the "normal requirements for the occupation in the area of intended employment", and thereby satisfy the requirements of section 656.21(b)(2), they would not suffice to meet the employer's burden under section 656.21(b)(5) to document the "actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer." The subject of feasibility was not addressed, either by showing a change of circumstances as suggested in the NOF, or otherwise, so that the application must be denied for failure to meet the test under section 656.21(b)(5).[4]

Accordingly, the following order will enter.

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[4] In denying the application, the FD referred to "unduly restrictive job requirements" which more properly pertains to section 656.21(b)(2)

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

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JAMES W. LAWSON
Administrative Law Judge

Judge Holmes, dissenting

I respectfully but firmly dissent. The sole basis on which the majority has denied certification is that : "the employer did not address, however, the issue of whether the alien gained the required work experience prior to employment with the petitioner." I disagree. Simply stated, the alien's resume demonstrates on its face experience that qualifies him for the job described; indeed, it is twice as much as the 7 years experience in the position described or an equivalent one as contained in Section # 14 of the application. Further explanation, however, is warranted concerning the other aspects of the CO's denial before returning to the majority's opinion.

A second basis for denial by the CO, was that "the employer did not submit any documentation to show that the exact job duties existed prior to the alien's employment or that a major change in business operation caused the position to be created after the alien was hired."

Employer is a consulting firm that does a worldwide business exclusively in the oil refining business. Alien is a chemical engineer, whose entire career approximately 15 years subsequent to obtaining his degree has been in the oil refining business, in increasingly responsible positions. Employer has explained its business and the job opportunity as follows:

"We are a professional consulting firm dedicated to offering our expertise in designing, developing and implementing efficient refinery processes for our customers, as well as providing them with technical services that enable them to use the full capabilities of our designs. In order to provide our customers with competitive, professional services, our employees must be well qualified to perform the duties of their respective positions. Our clientele look to us to provide expert consulting services for their refineries. If a client perceives that we provide consultants who do not possess experience in the specific systems involved, we will <u>lose</u> them.

As a consulting firm, our employment needs depend on the long term consulting assignments we are engaged in and the specific needs of our clients. Each job evolves over time and each job is different because of the specialized knowledge required by each team member in our team structured environment. Such structure is required to satisfy the ever changing business circumstances of this field and the demands placed upon KBC by its various clientele. Furthermore, each client presents itself as a new project with concerns and needs that are different than other clients we serve. Thus, each client-oriented project creates the need for consultants with different expertise. The demand for persons with Mr. Tufts' specialized knowledge in delayed coking is very high. There are currently 162 refineries operating in the United States, however, only 49 of them have inhouse delayed coking units. The remainder rely on the services of consulting firms like KBC to perform those services that they cannot provide for themselves inhouse. Without the delayed coking expertise of Mr. Tufts, KBC would not have been able to further expand its services to these clients."

Such an explanation of the consulting business appears elemental, and a failure to understand the business appears to be the main basis on which the CO had denied certification, and on which the majority relies. The consulting business is different from a large corporation in a specific business, let's use Proctor and Gamble as an example, where "chains of command" remain consistent through the years and are changed only in an evolving manner. In such organizations, specific positions are usually required, and often are specifically set out as to job duties in their personnel manual. In a consulting business, nearly the entire work force except staff and a minimal management structure is involved with consulting with outside companies. A premium is placed on expertise and/or capability to deal with personnel in the company or organization for which the consulting company is hired. Almost by definition, an element of "preference" as opposed to "necessity" is inherent in the job opportunity. The CO, in my opinion, is correct in being skeptical of such job opportunities and requiring that they not be a mere ruse for gaining labor certification for a valued employee.

However, that should not in and of itself cause a well qualified alien to be denied a labor certification for a legitimate, *bona fide* job opportunity when it has not been demonstrated that U.S applicants are willing, qualified and able to fulfill the job opportunity. Particularly is this true when a high level of expertise is required. In explaining the Immigration Act amendments of 1990, which was enacted into law and aimed in part in remedying the unintended consequence of the Act in keeping the best and brightest from our shores, the House Committee report stated: "The Committee is convinced that immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workplace needed in the increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers." The Committee was referring to "...highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found." (8 U.S.C. and A. News, 6711, et seq., 6721). Alien, here, would appear to fit into that category.

Moreover, the CO in my opinion, may have confused the job description in Section #13 with special requirements for the job contained in Section #15 of the ETA. Crucially, however, the majority's basis for affirming the CO's denial is that the Employer did not rebut the NOF finding that alien gained the work experience with Employer. Employer, *inter alia,* has provided

that the duties required for a Senior Chemical Engineer in the oil refining consultant business, are as described in Section #13 of the ETA normal for the industry by providing the affidavits of four disassociated professional experts in the field. I share the frank acknowledgment by the CO in the NOF that he was not familiar with such terms as HYSIM, PROIL, PETROfine, and COKOP. However, the conclusion reached by the CO that knowledge of these procedures was gained by alien entirely with the Employer is unwarranted. It should be noted that the job description stated the above described terms were examples of simulation tools used to evaluate refining units and was only one of several skills gathered through experience, necessary for the job opportunity. The resume of alien specifically demonstrated *prima facie* prior experience with simulation tools with Husky Oil, Ltd. From 1991 to 1994 in two separate capacities. True, such job description equivalencies, was not emphasized by Employer in his rebuttal (perhaps because Employer was intent on rebutting in certain and thorough terms the other objections raised by the CO and/or assumed the CO would find Employer's reasoning self-explanatory). It is clear, however, that an alien need not have all of the work experience of every duty described under Section #13 for the full time period required in the job opportunity under Section #14 (here 7 years) in order to qualify for the job opportunity. Moreover, while not addressed by the majority, Employer has alleged with some credulity an increase in business garnered by alien for the firm, offering an alternative method of rebuttal. Thus I would find that the other bases for denial, not addressed by the majority, have been rebutted by Employer.

Returning to the issue on which the majority has concluded that labor certification should be denied, I would find that Employer has successfully rebutted the allegation by the CO that the work experience was gained by the alien on the job with Employer by demonstrating that alien did have prior qualifying experience. In my opinion, where expertise is required in the job opportunity of a highly technical nature and where alien has demonstrated qualifications for such highly technical opportunities, unless clearly set out as restrictive or tailored to alien, the CO's attempt to evaluate Employer's actual needs for the job opportunity must be, should focus more on whether there are willing and qualified U.S. applicants.

Finally, I object to the pejorative language used by the majority in describing Employer's actions and motives such as "attempts to circumvent", "stereotyped...affidavits", "those cloned statements", "attempted to excuse the lack of direct evidence" and "employer has carefully obfuscated". (D&O, pp.5). There is no question in my mind that Employer is a firm conducting a valuable and desirable service in a competitive industry requiring expertise and that alien is a valuable contributing member of that firm with vast and specific experience obtained through education and prior experience for which Employer is willing to pay a high salary, and that alien will become a taxpaying, honorable contributor to U.S. society upon his achieving citizenship. It demeans the labor certification process to belittle meritorious attempts to obtain citizenship for such highly skilled individuals. The opinion should be directed towards the issues concerned.

Since the CO has not given a valid basis for denial, I would reverse and direct certification be granted. (Barbara Harris, 1988-INA-32 (1989)

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.